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IN THE

Supreme Court of the United States

October Term, 1940

No. 139

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
Petitioners,

vs.

ROCKWELL LIME COMPANY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

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Petitioners,

vs.

ROCKWELL LIME COMPANY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

MAY IT PLEASE THE COURT:

The petition of the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The fundamental question here presented is whether administrative determinations and orders of the Interstate Commerce Commission and state commissions, in this instance the Illinois Commerce Commission, in a joint hearing authorized by section 13 (3) of the Interstate Commerce

Act (49 U. S. C. 13 (3)), wherein, as this Court said in *United States* v. *Chicago Heights Trucking Co.*, ... U. S. ....., May 20, 1940, the Commissions were acting in their capacity as public agencies and carrying out duties imposed by the Congress in the interest of shippers generally, the national transportation and the public interest, can be defeated and set aside collaterally by state courts.

The judgment of the Supreme Court of Illinois, the highest court of that state, affirms a judgment of the Circuit Court of Cook County entered on March 23, 1939, setting aside an order entered by the Illinois Commerce Commission dismissing a complaint filed on behalf of respondents herein on September 21, 1928, seeking damages for collection of alleged illegal rates on carload shipments of sand and gravel during the period September 10, 1925, to February 15, 1927, to Chicago from origins on the Chicago and North Western and the Chicago, Milwaukee, St. Paul and Pacific, commonly known as the Milwaukee, in what is known as Zone I of the rate structure on sand and gravel in this territory.

The judgment of the Circuit Court, which was affirmed by the Supreme Court, directs the Illinois Commission to require petitioners to make restitution in connection with shipments moving during that period, in disregard of the fact that respondents' contentions were found without foundation by two administrative bodies, viz., the Interstate Commerce Commission and the Illinois Commerce Commission, in concurrent orders entered under authority of section 13 (3) of the Interstate Commerce Act under date of November 30, 1926 (Ex. 4; R. 51, 93-134; Ex. 6; Rec. 52, 147-164), and again by the Illinois Commission in the order of dismissal entered herein under date of January 4, 1933, in a separate and subsequent proceeding (R. 2-17), to all of which proceedings respondents herein were parties. (R. 50-51.)

On December 18, 1925, a complaint was filed with the Illinois Commission which became known as Docket 15878, *Chicago Gravel Co.* v. *A. T. & S. F. Ry. Co.*, referred to hereinafter as the *Illinois Chicago Gravel case.* The complaint, among other things, placed in issue the refusal of the Chicago and North Western and the Milwaukee to comply with the Illinois Commission's suspension order No. 15539 as to rates for intrastate transportation from Zone I to deliveries in Chicago. Reparation for alleged overcharges was sought. The complaint prayed also that the Illinois Commission consolidate the hearing of suspension order 15539 with the hearing requested in the complaint, and, after reciting that a similar complaint was being filed with the Interstate Commerce Commission, requested further that the Illinois Commerce Commission and the Interstate Commerce Commission proceed to a joint hearing. (R. 135-146)

Responsive to the request just referred to, the complaint in Illinois Dockets 15878, 15539, and 15191, collectively referred to herein as the *Illinois Chicago Gravel case*, and the complaint in Interstate Commerce Commission Docket 17817, *Chicago Gravel Co.* v. *A. T. & S. F. Ry. Co.*, later reported in 118 I. C. C. 633, and referred to herein as the *Chicago Gravel case*, were heard by the Illinois Commission on the same record and in a joint hearing with the Interstate Commerce Commission and the Public Service Commission of Indiana, as contemplated by section 13 (3) of the Interstate Commerce Act. Respondents herein were parties to that proceeding. (R. 50-51) Subsequently, on November 30, 1926, after an extensive and full hearing, concurrent reports and orders were entered by the Interstate Commerce Commission and the Illinois Commission in which the matters and issues tendered in the complaint in the *Illinois Chicago Gravel case* were decided adversely to respondents herein. (Ex. 4 and 6; R. 51-52, 93-134, 147-164)

The Interstate Commerce Commission found (Ex. 4; R. 51, 93-106) in its report and order in *Chicago Sand & Gravel Producers* v. *Director General,* 64 I. C. C. 37, decided September 23, 1921, hereinafter referred to as the *Chicago Producers case,* that the rate from points in Zone II on the Milwaukee and the Chicago and North Western for both state and interstate application to Chicago should be on a parity, fixed a differential of 5 cents* to be maintained Zone II over Zone I, and prescribed a rate basis for deliveries on connecting lines in Chicago. Maximum rates as modified by the general reduction of 1922 were 70 cents from Zone II and 65 cents from Zone I. During the process of publishing the general reduction of 1922 these rates erroneously had been published as 65 cents from Zone II and 60 cents from Zone I. (R. 104) The railroads constructed an adjustment of rates in this territory, applying the principles and within the framework of the Commission's findings and order in the *Chicago Producers case,* and filed tariffs with the Interstate Commerce Commission, the Illinois Commission, and the Public Service Commission of Indiana to become effective September 10, 1925. These tariff schedules named a single line rate from Zone I of 65 cents and 70 cents from Zone II, thus preserving the required differential of 5 cents Zone II over Zone I, and the measure of the rate found reasonable by the Interstate Commerce Commission. (R. 104) Protests were filed by certain producers against these rates. The Interstate Commerce Commission and the Indiana Commission declined to exercise their powers of suspension, but the Illinois Commission issued an order hereinbefore referred to as Docket 15539 purporting to suspend this rate adjustment so far as its intrastate application within Illinois was concerned. (R. 105)

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* Rates and differences in rates are stated in amounts per ton of 2,000 pounds.

In its concurrent order of November 30, 1926, in the *Chicago Gravel case* the Interstate Commerce Commission, among other things, found that (1) the finding and order in the *Chicago Producers case* applied to intrastate traffic from Zone I; (2) the order of that Commission in the *Chicago Producers case* was still outstanding; (3) the suspension order of the Illinois Commission did not become effective against the Chicago and North Western and the Milwaukee; (4) the rates referred to therein, among others 65 cents from Zone I to Chicago, became effective interstate, intrastate within Indiana, and intrastate within Illinois on the Chicago and North Western and the Milwaukee. (Ex. 4; R. 51, 103-105, 124)

It was admitted in the record before the Illinois Commission in the instant case by respondents' witness that if the Chicago and North Western and the Milwaukee had executed the suspension orders of the Illinois Commerce Commission there would have been a greater rate difference than 5 cents between Zone I and Zone II and there would have been instead of a parity a difference of 5 cents between Illinois origins and Wisconsin origins in Zone II. The witness asserted that the Chicago and North Western and the Milwaukee could have maintained a differential relationship by voluntarily suspending interstate rates. (R. 46-47)

The concurrent report and order of the Illinois Commission entered under date of November 30, 1926, is in this record as Exhibit 6. (R. 52, 147-164) Among other things there found is that the decision of the Interstate Commerce Commission in the *Chicago Gravel case* clearly sets forth pertinent facts of record; that the Interstate Commerce Commission, the Public Service Commission of Indiana, and the Illinois Commission had had several conferences in an endeavor to harmonize interstate and intrastate rates, and this it was believed had been accomplished in such a way as to avoid the exaction of unjust, unreasonable or

discriminatory rates. (R. 154-155) The Illinois Commission further found (R. 155-156) that the charges collected were not unjust, unreasonable or unduly discriminatory, and denied the prayer for reparation. (R. 156, 163)

The Illinois Commission also fixed 65 cents as a reasonable rate from Zone I, which was the exact measure of the base rate applied by petitioners during the period here involved. (R. 157) Both the Interstate Commerce Commission (R. 123-124) and the Illinois Commission (R. 157) in the *Chicago Gravel case* found reasonable and otherwise lawful base rates of 65 cents from Zone I and 70 cents from Zone II, making a differential between the two zones of 5 cents.

The judgment of the Supreme Court herein in effect requires the Illinois Commission to apply retroactively for the period here involved and for the sole benefit of respondents a rate of 60 cents from Zone I. This would result in respondents' rates being reduced retroactively, whereas rates of other intrastate shippers from Zone I would remain at 65 cents. Rates of all interstate and intrastate shippers from Zone II would remain at 70 cents. For respondents the differential between Zones I and II would be 10 cents and for all other shippers, both interstate and intrastate, 5 cents. (R. 123-124, 157-158.)

Contemporaneously with the filing of the complaint with the Interstate Commerce Commission in the *Chicago Producers case* a complaint was filed with the Illinois Commission placing in issue intrastate rates within the same territory, *Chicago Sand and Gravel Producers, et al.*, v. *A. T. & S. F. Ry. Co., et al.*, and received the docket number of 10666. That proceeding was heard on the same record with Docket No. 15311, *Wisconsin Lime & Cement Co.* v. *Chicago and North Western Ry. Co., et al.*, Docket No. 15211, *Fisk Material & Coal Co.* v. *Chicago and North Western Ry. Co.*, and Docket No. 15505, *Chicago Fire Brick Co.* v. *Chicago*

and North Western Ry. Co., collectively referred to hereinafter as the *Illinois Chicago Producers case*. By agreement of all parties (R. 175), the record made at the hearings before the Interstate Commerce Commission in the *Chicago Producers case* was made a part of the record in the cases just described.

Six of the respondents herein were parties to the *Illinois Chicago Producers case*. (R. 165-173)

Under date of July 16, 1930, the Illinois Commission entered a report and order, which found, among other things, that it was without jurisdiction within the territory covered by the order in the *Chicago Producers case*. (Ex. 7; R. 52, 165-196.)

Respondents herein made no effort to obtain a review of the order of the Interstate Commerce Commission in the *Chicago Producers case* as construed and applied in the *Chicago Gravel case*, in the manner provided by law (Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220), nor did they prosecute an appeal from the order of the Illinois Commission entered under date of November 30, 1926, in the *Illinois Chicago Gravel case* or from the order of the same Commission entered under date of July 16, 1930, in the *Illinois Chicago Producers case*.

Respondents, without pursuing a direct review of the aforesaid orders, filed the complaint herein with the Illinois Commission on September 21, 1928, wherein the substance of what has been stated above as to the allegations of their complaint in the *Illinois Chicago Gravel case* concerning petitioners' failure to comply with the Illinois Commission's suspension order 15539 was repeated. (R. 23)

Petitioners' amended answer and motion to dismiss (R. 29-32) set forth in substance the proceedings, reports, and orders of the Interstate Commerce Commission in the *Chicago Producers case*, the *Chicago Gravel case*, and of the Illinois Commerce Commission in the *Illinois Chicago*

Gravel case. The amended answer and motion to dismiss stated further that the order of the Interstate Commerce Commission in the *Chicago Producers case,* effective January 5, 1922, provided in terms that it should continue until the further order of the Commission, and that ever since the effective date it had been in full force and effect.

To defendants' answer and motion to dismiss complainants filed a reply under date of November 21, 1928. The reply, however, did not deny that the Interstate Commerce Commission's order in the *Chicago Producers case* was issued and was continuing in character. The reply in its nature was one of confession and avoidance, in that it asserted that the order was silent in regard to Illinois inner zone rates and the order was void. (R. 32-37.)

The Illinois Commission in its order entered under date of January 4, 1933, dismissing the complaint herein found that petitioners were confronted with conflicting orders, one from that Commission requiring them to suspend certain increases in rates and another from the Interstate Commerce Commission ordering them to observe a certain differential from Zone I under the outer zone, and manifestly petitioners could not comply with both orders. (R. 15) The Illinois Commission further found that it was without jurisdiction to award reparation and thus override an order of the Interstate Commerce Commission. (R. 17, 230)

B.

BASIS OF JURISDICTION.

(*a*) Jurisdiction is sustained by section 237 (*b*) of the Judicial Code, as amended by act of February 13, 1925, 43 Stat. 936, 937 (28 U. S. C. sec. 344).

(*b*) There is drawn in question herein Article I, section 8, clause 3 of the Constitution of the United States extending to the Congress power to regulate commerce among the

several states and the validity of amended sections 41, 208, and 211, Judicial Code, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, sections 3, 13, and 15a of the Interstate Commerce Act, and rules prescribed by the Interstate Commerce Commission under authority of section 13 (3) of that act, and reports and orders of the Interstate Commerce Commission and of the Illinois Commerce Commission entered at a joint hearing contemplated by and under the authority of that act.

The Illinois statutes, particularly sections 32 to 39, inclusive, sections 64 to 73, inclusive, and section 76, Chapter 111-2/3, Illinois Revised Statutes, 1939, as applied by the Supreme Court of that state in reversing the state administrative body, are repugnant to the Constitution of the United States and the laws of the United States, including the Urgent Deficiencies Act of October 22, 1913, and the Interstate Commerce Act, and the paramount authority of the Congress exercised through its administrative agency, the Interstate Commerce Commission.

(*c*) Judgment of the Supreme Court of Illinois was entered under date of February 13, 1940. (R. 237-238) Timely petition for rehearing was filed by petitioners and denied by that court on April 3, 1940 (R. 238-239), less than three months prior to filing this petition for writ of certiorari.

(*d*) Cases sustaining jurisdiction are:

Penn. R. Co. v. *Ills. Brick Co.*, 297 U. S. 447;
Stoll v. *Gottlieb*, 305 U. S. 165;
American Express Co. v. *Caldwell*, 244 U. S. 617, 628;
Lancaster v. *McCarty*, 267 U. S. 427;
Gt. No. Ry. v. *Merchants Elev. Co.*, 259 U. S. 285;
Northern Pacific Ry. Co. v. *Solum*, 247 U. S. 477;
Grubb v. *Public Utilities Comm.*, 281 U. S. 470.

The judgment of the Supreme Court of Illinois is a final judgment terminating this litigation on the merits. It affirms the judgment of the Circuit Court of Cook County, which reverses the order of the Illinois Commerce Commission dismissing the complaint and directs that Commission to award restitution to the respondents, leaving the Commission no administrative or other discretion and no opportunity to reexamine the questions presented. The judgment affords no basis for another appeal (R. 202-204). The law of Illinois, as construed by the Appellate and Supreme Courts of that state, does not permit an appeal by a railroad from an order entered by the Commission for the payment of money. *Medusa Portland Cement Co.* v. *Ill. Cent. R. Co.*, 287 Ill. App. 549. *Terminal R. R. Assn.* v. *Utilities Com.*, 304 Ill. 312. Cases holding that the judgment is final within the meaning of the statute relating to jurisdiction are:

Ellis v. *Int. Com. Comm.*, 237 U. S. 434;
Clark v. *Williard*, 292 U. S. 112;
Knox Loan Assn. v. *Phillips*, 300 U. S. 194;
Laclede Gas Co. v. *Comn.*, 304 U. S. 398;
Cobbledick v. *U. S.* — U. S. —, 84 L. Ed. 524.

C.

QUESTIONS PRESENTED.

The Federal questions sought to be reviewed herein were raised before the Illinois Commission in petitioners' amended answer and motion to dismiss (R. 29-32, 227-228), by similar motion to dismiss made at the beginning of the hearing (R. 41), and by renewal of the same motion after the completion of the taking of testimony. (R. 53) Under the law of Illinois (Sec. 72, Chap. 111-2/3, Ill. Rev. Stats., 1939) an appeal to the Circuit Court must be heard and determined upon the record made before the Illinois Commission.

The Federal questions were raised also upon appeal to the Supreme Court of Illinois in statement of errors contained in petitioners' brief filed with that Court* and made of record herein. (R. 219-223)

The Supreme Court of Illinois passed on the Federal questions adversely to respondents and denied Federal authority in the premises. That Court held in substance: (1) State courts have jurisdiction and power to review, construe, and apply orders of the Interstate Commerce Commission and to pass judgment on whether such orders are sufficiently definite and supported by adequate findings of fact (R. 232-233, 235); (2) state courts have jurisdiction and power to review collaterally proceedings before the Interstate Commerce Commission, to determine what was in issue therein and to make findings contrary to those made by that Commission (R. 232-233, 235); (3) orders of state commissions entered concurrently with orders of the Interstate Commerce Commission as the result of joint hearing authorized by the Congress in section 13 (3) of the Interstate Commerce Act are subject to collateral attack even by parties who were also parties of record in the joint hearing (R. 236); (4) concurrent reports and orders of the Interstate Commerce Commission and a state commission entered as the result of a joint hearing under section 13 (3) of the Interstate Commerce Act cannot be considered as evidence, although introduced of record (R. 229-236); (5) the subject matter of concurrent reports and orders of the kind just described is not clothed with public interest but is purely one for private litigation (R. 236); (6) an order of the Interstate Commerce Commission may be effectually annulled and set aside as the result of an alleged defect in proof in a collateral proceed-

* Under the practice in Illinois, no assignment of errors is filed with the Supreme Court of Illinois and included in the record of any case, this assignment being replaced by statement of errors incorporated in appellants' brief.

ing to which neither the United States nor the Interstate Comerce Commission is a party (R. 232-236). In substance the effect of the decision of the Supreme Court herein is that state courts have the power to review and to set aside and annul orders of the Interstate Commerce Commission.

The Federal questions sought to be reviewed are substantial and of public concern. So far as petitioners have ascertained, this Court has never had occasion to review or consider the policy of the Congress as set forth in section 13 (3) of the act relating to joint hearings with state commissions. If the decision of the Illinois Supreme Court is permitted to stand as a precedent for action by state authority, administration of the legislative policy of the Congress will be obstructed by requiring on demand of dissatisfied litigants retrial of administrative questions determined by concurrent orders and by requiring unusual and burdensome methods and standards of proof.

The decision is violative of principles emphasized by the Court in *U. S.* v. *Chicago Heights Trucking Co.*, ... *U. S.* ....., May 20, 1940, that these administrative bodies, the Interstate Commerce Commission and the Illinois Commission, are informed by experience and they act as public agencies and carry out duties imposed by the Congress in the interest of shippers generally, the national transportation system and the public interest.

There can be no ordered and effective administration of the Interstate Commerce Act, and particularly section 13 (3), if state courts are permitted collaterally to set aside determinations and orders made as the result of joint hearings and to create preferences and prejudices and unjust discrimination by judicial fiat.

The law has been considered well established that state courts have no power or jurisdiction to construe, review and annul determinations and orders of the Interstate Com-

merce Commission. If the decision of the Illinois Supreme Court herein is permitted to stand it will encourage and tend to promote litigation in state courts concerning the authority of the Congress as exercised by its administrative agency, the Interstate Commerce Commission.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioners rely upon the following reasons for the issuance of the writ:

1. The Supreme Court of Illinois, in holding that concurrent reports and orders of the Interstate Commerce Commission and the Illinois Commission in a joint proceeding authorized by the Congress in section 13 (3) of the Interstate Commerce Act are not entitled to be considered as evidence although introduced of record, and in sustaining a collateral attack in the state courts upon orders of the Interstate Commerce Commission and the Illinois Commission, has decided a Federal question of substance not heretofore determined by this Court and has decided in a way not in accord with applicable decisions of this Court. If the decision herein of the Supreme Court of Illinois is permitted to become a precedent, the legislative policy and paramount authority of the Congress, as asserted in the Interstate Commerce Act, particularly section 13, will be obstructed and defeated by requiring on demand of dissatisfied litigants repeated retrials of matters administratively determined in such proceedings and by requiring methods and standards of proof more burdensome than usually required in administrative proceedings.

2. The decision is directly violative of principles applied by this Court in *U. S.* v. *Chicago Heights Trucking*

Co., ... U. S. ....., May 20, 1940, that the Interstate Commerce Commission and the Illinois Commission are expert bodies informed by experience and their acts were those of public agencies carrying out duties imposed by the Congress in the interest of shippers generally, the national transportation system and the public interest.

3. The Supreme Court of Illinois, in asserting the power and jurisdiction to review and pass upon the validity of orders of the Interstate Commerce Commission and in setting aside and annulling the orders of that commission involved herein, has failed to give recognition to the statutes of the Congress of the United States and has departed from applicable decisions of this Court in the premises, all of which will have the direct tendency to throw into confusion the orderly and effective administration of the Interstate Commerce Act and the exercise of the power of the Congress under Article I, Section 8, Clause 3, of the Constitution of the United States to regulate commerce.

4. The Supreme Court of Illinois, in addition to erring as above stated, erred as follows:

(1) In entering judgment the effect of which is to set aside and annul the order of the Interstate Commerce Commission in the *Chicago Producers case* as construed and applied in the *Chicago Gravel case,* notwithstanding the fact that the United States is not a party to this proceeding and could not be joined as a party, since under the provisions of amended sections 41, 208, and 211, Judicial Code, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, the United States has not consented to be sued in state courts and has authorized the commencement of such suits only in a specially constituted United States District Court.

(2) In considering the proceedings before the Interstate

Commerce Commission referred to herein as the *Chicago Producers case,* and *Chicago Gravel case,* and before the Illinois Commission as the *Illinois Chicago Gravel case,* and the *Illinois Chicago Producers case,* and the orders resulting therefrom as merely private litigation and in failing to give them effect as general in operation and thus binding on the public and binding upon respondents for the additional reason that they were parties to said proceedings. The effect of the Court's misapplication of the law is to create a preference in favor of respondents and to destroy the uniformity which federal and state statutes, and the administrative bodies created thereby, were designed to secure.

(3) In unlawfully interfering with findings and orders entered by two administrative bodies, the Illinois Commerce Commission and the Interstate Commerce Commission, determining the subject matter hereof adversely to respondents in a joint hearing authorized and contemplated by Section 13 of the Interstate Commerce Act.

(4) In entering judgment which creates undue and unreasonable advantages, preferences or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, and undue and unreasonable and unjust discrimination against interstate commerce, all in violation of the aforesaid provisions of the Constitution and statutes of the United States.

(5) In not giving legal effect to the undisputed fact that at the time involved petitioners were confronted with conflicting orders of the Interstate Commerce Commission, on the one hand, and the Illinois Commerce Commission, on the other hand, and they were bound by law to conform to the requirements of the Interstate Commerce Commission.

(6) In ignoring and giving no effect to the evidence of record, particularly petitioners' Exhibits 4, 5, 6, 7, and 8.

(7) In entering judgment in disregard of the fact that the proceedings before the Interstate Commerce Commission and the joint proceedings before that commission and the Illinois Commission and the lack of jurisdiction in the courts of Illinois were disclosed by the pleadings herein.

(8) In entering judgment upon a ground not set forth in the application for rehearing before the Illinois Commission.

(9) In ignoring the fact that the undisputed evidence shows that the Illinois Commission had full notice and actual knowledge of the order of the Interstate Commerce Commission entered under date of January 5, 1922, as subsequently construed and applied, and the Illinois Commission was not free to disregard said order but was bound by law to refrain from interfering with or infringing upon it in any respect.

(10) In ignoring the fact that under the issues and record upon this appeal, the rates charged must be conclusively regarded as reasonable for the transportation service rendered, and there is no theory upon which respondents lawfully could prevail.

(11) In entering judgment which, although based on an alleged defect in proof, in that the order of the Interstate Commerce Commission in the *Chicago Producers case* was not sufficiently established of record, directs the Illinois Commission as to its procedure on the merits and to require petitioners to make restitution to respondents.

(12) In failing to hold that the subject matter of respondents' cause herein is barred by the doctrine of administrative finality.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Illinois, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 25300, *Rockwell Lime Company, et al., Appellees,* v. *Chicago and North Western Railway Company, et al., Appellants,* and that the said judgment of the Supreme Court of Illinois may be reversed, and that your petitioners may have such other and further relief in the premises as to this Court may seem proper.

Dated at Chicago, Ill., June 5, 1940.

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